

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

KELLY MILLIGAN,  
ON BEHALF OF HIMSELF AND  
ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

vs.

MERRILL LYNCH, PIERCE, FENNER &  
SMITH INC., BANK OF AMERICA CORP.,  
and JOHN/JANE DOE 1, THE SENIOR VICE  
PRESIDENT–HUMAN RESOURCES  
GLOBAL BANKING AND GLOBAL  
WEALTH AND INVESTMENT  
MANAGEMENT ADMINISTRATION AT  
BANK OF AMERICA CORP.,

Defendants.

Civil Action No. 3:24-cv-00440-KDB-  
DCK

Judge Kenneth D. Bell  
Magistrate Judge David Keesler

**DECLARATION OF M. ZANE JOHNSON IN SUPPORT OF PLAINTIFF'S  
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, M. Zane Johnson, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an associate with the law firm Motley Rice LLC, co-counsel for the Plaintiff Kelly Milligan.

2. I have been actively involved in all material aspects of the Action since I joined Motley Rice in March 2024. I make this Declaration in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

3. Defendants produced a limited set of documents in support of their Motion to for Summary Judgment (the "Motion"), ECF 41, and in response to Plaintiff's requests for production.

## **The Data Set**

4. During discovery, Merrill produced an Excel spreadsheet containing information about each WealthChoice award payment made to Merrill financial advisors (“FAs”) between January 1, 2018, and June 30, 2024, identified by a Bates number MERRILL\_WDNC\_00000001 (the “Data Set”).<sup>1</sup>

5. The Data Set appears to contain the data used to prepare the Declaration of Suzanne Testani, which is Exhibit 1 to the Motion. ECF 41-2. The Data Set contains, among other information, the ID of the FA that Merrill paid, the date Merrill granted the award, the date the award vested, the date Merrill paid the award, and the amount of the payment.

6. The Data Set contains a “Category” field, which Merrill said it generated, and which describes each payment as Normal Cliff Vesting, Retirement, Deceased, or Special Agreement. The Data Set also shows the termination date for many individuals, representing the day the individual’s employment with Merrill ended.

7. Each row in the Data Set represents a single payment to a single FA. Between January 1, 2018, and June 30, 2024, the Data Set shows that [REDACTED] payments were made to [REDACTED] different FAs.

8. Between January 1, 2018, and June 30, 2024, Merrill made payments to [REDACTED] FAs (18.6%) categorized as “Retirement” or “Deceased,” or after the individual’s listed termination date.

9. Between January 1, 2018, and June 30, 2024, Merrill paid FAs a total of [REDACTED] including [REDACTED] (15.3%) to FAs after the termination of their

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<sup>1</sup> Merrill also produced an Excel spreadsheet Bates-numbered MERRILL\_WDNC\_003120 that contains additional fields.

employment. Of this amount, Merrill classified [REDACTED] (13.5%) as “Retirement,” [REDACTED] (1.1%) as payments to deceased FAs, and [REDACTED] (0.7%) as “normal” vesting payments to FAs after the individual’s termination date.

10. The Data Set contains a column showing the vesting date for each payment. For payments made to active Merrill FAs, the vesting date is eight years after the date the award was granted. For example, the vesting date for an award granted February 15, 2010, will be around February 15, 2018.<sup>2</sup> But if an FA leaves Merrill under the Plan’s “Retirement” provision, the FA is paid one-half of their unvested awards shortly after the end of the calendar year in which they leave Merrill and the other one-half shortly after the end of the next calendar year.

11. This is shown in the records in the Data Set. Merrill granted WealthChoice awards in the February of each year between 2010 to 2017 to the FA with [REDACTED] terminated employment with Merrill on January 25, 2018, and Merrill categorized each payment to [REDACTED] as “Retirement.” The Data Set reflects that the vesting dates for [REDACTED] WealthChoice awards are January 1, 2019, and January 1, 2020. This includes awards granted on February 12, 2010, that would have vested on February 12, 2018, under the eight-year cliff vest. It also includes awards granted on February 12, 2016, and February 15, 2017, that would have vested on February 12, 2024, and February 15, 2025, respectively, under the eight-year cliff vest.

12. Attached as Exhibit A is an excerpt from the Data Set showing these payments and the normal eight-year cliff vesting date of each payment.

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<sup>2</sup> For example, Merrill granted an award to [REDACTED] on February 12, 2010, and this award vested on February 28, 2018.

**Merrill's Treatment of WealthChoice Awards as Deferred Compensation**

13. During discovery, Merrill produced its Consolidated Balance Sheets for the years ending December 31, 2020, to December 31, 2023, and a monthly ledger for 2022 and 2023.

14. Attached as **Exhibit B** is a true and correct copy of Merrill's Consolidated Balance Sheet for the year ending December 31, 2020.

15. Attached as **Exhibit C** is a true and correct copy of Merrill's Consolidated Balance Sheet from the year ending December 31, 2021.

16. Attached as **Exhibit D** is a true and correct copy of Merrill's Consolidated Balance Sheet from the year ending December 31, 2022.

17. Attached as **Exhibit E** is a true and correct copy of Merrill's Consolidated Balance Sheet from the year ending December 31, 2023.

18. Attached as **Exhibit F** is a true and correct copy of a document titled "US GAAP Month Ledger," which shows Merrill's calculated values for various components of FA compensation for 2022 and 2023.

Executed this 6th day of December 2024 in Hartford, Connecticut.

*/s/ M. Zane Johnson*  
M. Zane Johnson